No. 21567

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELDON O. HALDANE,

Appellant,

vs.

WILHELMINA HELEN KING CHAGNON, HORACE N. FREEDMAN, LEONARD S. SANDS, GORDON THOMPSON, WILFRED H. TOMLIN, and ALBERT D. MATTHEWS,

Appellees.

APPELLEE GORDON THOMPSON'S BRIEF.

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APPELLEE GORDON THOMPSON'S BRIEF.

Appellee Gordon Thompson, for himself alone, and for no other appellee, respectfully files this brief in opposition to appellant's opening brief, and in support of the Judgment of the District Court dismissing appellant's action upon the ground that it fails to state a claim upon which relief can be granted.

Statement of the Case.

Appellant instituted the within action in the Federal District Court on January 23, 1966. In his Complaint he alleged that all of the named appellees had participated in a conspiracy to deprive him of equal protection of the laws in violation of 42 U.S.C. Sec-

tion 1985(3) (The Civil Rights Act) and the Fourteenth Amendment of the United States Constitution.

With regard to appellees Chagnon, Freedman and Tomlin, appellant alleges, among other things, that during divorce proceedings initiated by his former wife in 1961, said appellees conspired to falsely imprison him pursuant to California Welfare and Institutions Code, Sections 5047 *et seq.* In 1964 appellant brought an action under the same section of the Civil Rights Act against said appellees, and others, and alleged the same events; however, appellant did not include as defendants Gordon Thompson, Leonard S. Sands, or Albert Matthews. The District Court in that action dismissed the Complaint for failure to state a claim upon which relief could be granted, and the Ninth Circuit Court of Appeals affirmed the decision. *Haldane v. Chagnon,* 345 F. 2d 603 (9th Cir. 1965).

The within action is basically a repetition of Mr. Haldane's previous law suit; however, certain additional facts and defendants have been added in an apparent attempt to avoid the problem of *res judicata.* Specifically, the additional facts which appellant has alleged in order to include Thompson and Sands are set forth in paragraphs 18, 20, 21 and 23 of the Complaint [R. 2]. In paragraph 18, appellant describes "overt acts" eight and nine where

> "defendants Sands and Thompson substituted themselves into the case (the aforementioned divorce proceedings) at the instigation of Chagnon and Freedman in lieu of Chagnon as attorney of record, with full personal knowledge of the felonies committed on the person of plaintiff while the marriage was in full force and effect. . . ."

In paragraph 20 appellant alleges "overt acts" numbers ten and eleven where appellees Thompson and Sands

> "did demand and receive in Department 8 of Los Angeles Superior Court Judgments for thousands of dollars as attorneys' fees against this plaintiff, which sums were later modified drastically downward by the intermediate court in *Haldane vs. Haldane,* 210 Cal. 2d 587."

In paragraph 21, appellant describes "overt act" number twelve in which

> "defendants Sands and Thompson recorded in the Official Records of Los Angeles County document 5162, book M 947, pages 651-654 inclusive, being judgment liens of $1,500.00 principal less $120.00 credits, before the modification in Haldane vs Haldane, 210 Cal. App. 2d 587. . . ."

In paragraph 23 appellant alleges "overt act" number thirteen in which Sands and Thompson procured from Judge Roger Alton Pfaff a "purported final decree based on a false affidavit" in the divorce action. Thus, the overt acts by which appellant attempts to connect appellees Sands and Thompson with the alleged conspiracy consists of:

(1) Substitution of themselves as attorneys for Mrs. Haldane in the divorce proceedings after the alleged false imprisonment had already taken place;

(2) Obtaining a judgment against Mr. Haldane for attorneys' fees;

(3) Recordation of a Judgment Lien for attorneys' fees prior to the appeal to the California District Court of Appeal;

(4) Obtaining a final decree in the divorce suit.

After appellant filed his Complaint in the within action, motions to dismiss the complaint for failure to state a claim upon which relief can be granted were filed by all defendants. The motions were granted by the District Court with prejudice as to all defendants, and it is from this Judgment of Dismissal that the appellant has appealed.

Summary of Argument.

The Judgment of Dismissal was properly granted by the District Court, and should be affirmed as to Gordon Thompson as well as all other appellees for the following reasons:

(1) The Complaint fails to establish that the defendants were acting under color of state law;

(2) The Complaint fails to show how the appellant was denied equal protection of the laws or equal privileges and immunities.

ARGUMENT.

I.

The Complaint Fails to State a Claim Upon Which Relief Can Be Granted in That It Fails to Establish That Any of the Defendants Were Acting Under Color of State Law.

It is uniformly held in cases in which a violation of Section 1985(3) is alleged that a plaintiff must show that the defendants acted "under color of state law or authority." *United States v. Guest,* 383 U.S. 745, 86 S. Ct. 1170, 16 L. Ed. 2d 239 (1965); *Collins v. Hardyman,* 341 U.S. 651, 71 S. Ct. 937, 95 L. Ed. 1253 (1951); *Haldane v. Chagnon, supra; Hoffman v. Halden,* 268 F. 2d 280 (9th Cir. 1959).

Appellant has failed to make such a showing in his Complaint. Two of the alleged overt acts of Thompson involved State Court Judges. These acts were the obtaining, together with appellee Sands, of a judgment for attorneys' fees and the obtaining of a final decree in the divorce suit. It is submitted that the principal discussed in *Haldane v. Chagnon, supra,* is applicable with regard to said acts. In *Haldane,* the court pointed out that judges when acting within the scope of their authority are immune from prosecution under the Civil Right's Act. The court also makes the following statement:

> "With the elimination of the defendant judges and bailiff from the case, *claims against the defendant attorneys under the Civil Right's Act cannot be stated.* The attorneys were not state officers, and they did not act in conspiracy with a state officer against whom appellant could state a valid claim. It follows that they did not, and could

> not commit alleged wrongful acts 'under the color of state law or authority'; hence, they are not subject to liability under the Civil Rights Act." (emphasis added).

Appellant in his opening brief takes exception with the principle of judicial immunity, and urges that this honorable court overrule its previous decision in *Haldane v. Chagnon, supra.* The United States Supreme Court has recently restated the principle of judicial immunity in *Pierson v. Ray,* 35 Law Week 4342 (April 11, 1967). In *Pierson* the plaintiffs had been convicted of violating a breach of peace statute by a local Municipal Police Justice. The plaintiffs brought an action in the Federal District Court against the Justice, the Policeman who had arrested them, and others. It was charged that there had been a violation of 42 U.S.C. Section 1983, and the plaintiffs also included counts for common law false arrest and false imprisonment. The jury in the District Court found for the plaintiffs and against all defendants on all counts. The Fifth Circuit Court of Appeals reversed as to the Justice, stating that he was immune from liability under both the Civil Right's Act and under Common Law offenses. The Supreme Court stated:

> "We find no difficulty in agreeing with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions . . . few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their jurisdiction . . . this immunity applies even when the judge is accused of acting maliciously and corruptly . . .

> "We do not believe that this settled principle was abolished by Section 1983, which makes liable any person who under color of law deprives another person of his Civil Rights. The Legislative Record gives no clear indication that Congress meant to abolish wholesale all Common Law immunities."

It is also contended by appellee Thompson that "overt acts" number twelve and number thirteen do not state a claim upon which relief can be granted. The act of Thompson substituting himself as an attorney of record in the divorce action could not by the wildest stretch of anyone's imagination be construed to be an act committed under "color of state law." No state officials were involved, and as was stated in the above quoted portion of *Haldane,* private attorneys are not state officers. Indeed, it was said *Skolnick v. Spolar,* 317 F. 2d 857 (7th Cir. 1963), that:

> "Lawyers who participate in the trial of private state court litigation are not state functionaries acting under color of state law within the meaning of the Federal Civil Rights Acts."

With regard to the recordation of the judgment, when such a lien is recorded there is some participation on the part of the County Recorder. However, appellant has not charged that there was any conspiracy among the defendants Thompson and Sands and the County Recorder. Thus, a claim has not been stated under the Civil Rights Act.

II.

The Complaint Fails to State a Claim Upon Which Relief Can Be Granted in That It Fails to Establish That the Appellees Purposely Discriminated Against the Appellant, or That the Appellant Was Denied Equal Protection or Equal Immunity and Privileges Under the Law.

Assuming, *arguendo,* that somehow state action was involved in the alleged "overt acts" of Thompson, appellant still must show that the alleged conduct "subjected the plaintiff to the deprivation of rights, privileges, or immunities secured by the Constitution of the United States." *Haldane v. Chagnon, supra* at page 603. It becomes evident from a reading of the Complaint that appellant contends that he was deprived of equal protection of the law. Section 1985(3) has been held to be applicable *only* where there has been a denial of equal protection or of equal privileges and immunities, and a showing that there has been such a denial is an essential element of stating a claim under this section. *Collins v. Hardyman, supra.*

Appellant has in no way been able to demonstrate how he was deprived of equal protection. His Complaint is a mixture of legal conclusions, invective and bald assertions. Appellant apparently contends that since Negro government officials performed certain functions in his divorce case that he was discriminated against. He has made some rather bold allegations pertaining to the two Negro defendants, Tomlin and Matthews, in paragraphs 4 and 5 of his Complaint, but he has failed to show how these defendants discriminated against him either alone or in a conspiracy with Thompson or Sands.

While it is true that Rule 8(a) of the Federal Rules of Civil Procedure requires only that a Complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief," it is generally held in cases involving the Civil Rights Act that mere legal conclusions are not enough. The Complaint must show what Constitutional rights were violated and how they were violated. The proposition was aptly discussed in the recent case of *Shakespeare v. Wilson,* 40 F.R.D. 500 (1966). There, a Complaint for damages for violation of the Federal Civil Rights Act was dismissed for failure to comply with the Federal Rules of Civil Procedure, Rule 8(a)(2). The court said on page 504:

> "In a case such as this, where disappointed litigants in the State Courts seek to bring dozens of defendants into the Federal Courts, solely as an expression of hurt feelings and dissatisfaction with the results in state tribunals . . . the pleadings must show that the pleader is entitled to relief with sufficient clarity that a defendant is on notice of acts charged against him in order to be able to form a defense. It also means that the court will be in a position to see that there is some legal basis for recovery. This is particularly important in the Civil Rights Act area, where on scrutiny, it is often revealed that a plaintiff is trying to use the Civil Rights Act as a way of 'appealing' a State Court judgment, and where plaintiff is trying to raise solely state law claims, e.g. false imprisonment and malicious prosecution."

In *Lombardi v. Peace,* 259 F. Supp. 222 (S.D.N.Y. 1966), it was said that to state a claim within the purview of 42 U.S.C. 1985(3) that it was neces-

sary to allege facts amounting to an intentional and purposeful discrimination against the plaintiff as an individual or as a member of a class. In *Snoden v. Hughes,* 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1964), the plaintiff had brought an action for damages under the Civil Rights Act, and the court stated that there must be an allegation of facts tending to show that the defendants had committed an intentional or purposeful discrimination between persons or classes. The court said at page 10:

> "The lack of any allegations in the Complaint here, tending to show a purposeful discrimination between persons or classes or persons is not supplied by opprobrious epithets 'willful' and 'malicious' . . . or by characterizing (defendant's conduct) as an unequal, unjust, and oppressive administration of the laws of Illinois. These epithets disclose nothing as to the purpose or consequence of the (defendant's conduct)."

In *Dunn v. Gazzola,* 216 F. 2d 709 (1st Cir. 1954), the plaintiff, who had been convicted of child neglect and subsequently had been sent to a reformatory, charged that 42 U.S.C. Section 1985(3) had been violated by city officials in that she had not received a fair trial. The court said:

> "The bare conclusionary allegations that the defendants jointly conspired for the purpose of depriving the plaintiff of equal protection of the laws and of her rights and privileges and immunities secured to the plaintiff by the Constitution and laws of the United States without any support in the facts alleged could not protect the Complaint from the Motion to Dismiss."

Thus, although the appellant in the within action has alleged some overt acts and after each act has charged that he was denied equal protection, he has not shown any discrimination between persons or classes but has made mere conclusionary statements.

Conclusion.

For each and all of the foregoing reasons appellee Thompson respectfully urges that the District Court properly dismissed the Complaint, and that the Judgment of Dismissal entered in this action should be affirmed.

Respectfully submitted,

BOOTH, MITCHEL, STRANGE & WILLIAN,
By DONALD W. REES,
Attorneys for Appellee Gordon Thompson.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DONALD W. REES